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File No.: 102845

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

BWP Media USA Inc. d/b/a Pacific Coast
News, FameFlynet, Inc., National Photo
Group, LLC and Michael Kelley,

Plaintiffs,

vs.

PANDAWHALE, INC.,

Defendant.

Docket No:

COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs, BWP Media USA Inc. d/b/a Pacific Coast News ("BWP"), FameFlynet, Inc. ("Fame"), National Photo Group, LLC ("NPG") and Michael Kelley ("Kelley") (hereinafter collectively referred to as "*Plaintiffs*"), by and through their undersigned counsel, as and for their Complaint against Defendant PANDAWHALE, INC. ("*Defendant*") state and allege as follows:

INTRODUCTION

1. This action seeks to recover for copyright infringement.

1 2. Plaintiffs provide entertainment-related photojournalism goods and
2 services and own the rights to photographs, primarily featuring celebrities,
3 which they license to online and print publications for profit.

4 3. Plaintiffs have obtained U.S. copyright registrations for many of
5 their photographs, and others are the subject of pending copyright applications.

6 4. Defendant owns and operates a website known as pandawhale.com
7 and www.pandawhale.com (collectively, the “*Website*”) and, without permission
8 or authorization from Plaintiffs, actively copied, stored, modified, and/or
9 displayed Plaintiffs' photographs on the Website and engaged in this misconduct
10 knowingly and in violation of the United States copyright laws.

11 **JURISDICTION AND VENUE**

12 5. This Court has subject matter jurisdiction over the federal copyright
13 infringement claims pursuant to 28 U.S.C. §1338(a) and 28 U.S.C. §1331.

14 6. Additionally, this Court has subject matter jurisdiction over all of
15 the photographs, inclusive of any unregistered images. *Reed Elsevier, Inc. v.*
16 *Muchnick*, 559 U.S. 154, 130 S.Ct. 1237 (2010); *Perfect 10, Inc. v.*
17 *Amazon.com, Inc.*, 508 F.3d 1146, 1154 99th Cir. 2007); *Olan Mills, Inc. v. Linn*
18 *Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994); *Pac. & S. Co., Inc., v. Duncan*,
19 744 F.2d 1490, 1499 n. 17 (11th Cir. 1984).

20 7. This Court has personal jurisdiction over PANDAWHALE, INC.
21 because PANDAWHALE, INC. maintains its principal place of business in
22 California.

23 8. Venue is proper under 28 U.S.C. §1391(a)(2) because
24 PANDAWHALE, INC. does business in this Judicial District and/or because a
25 substantial part of the events or omissions giving rise to the claim occurred in
26 this Judicial District.

PARTIES

I. Plaintiffs

9. BWP is a Delaware corporation and maintains its principal place of business in Los Angeles County, California.

10. NPG is a California limited liability company and maintains its principal place of business in Los Angeles County, California.

11. Fame is a California corporation and maintains its principal place of business in Los Angeles County, California.

12. Plaintiff Kelley is an individual who is a citizen of the State of California and maintains a principal place of business in Los Angeles County, California

II. Defendant

13. Upon information and belief, Defendant PANDAWHALE, INC., is a California corporation with a principal place of business in Santa Clara County, California, and is liable and responsible to Plaintiffs based on the facts herein alleged.

FACTS COMMON TO ALL CAUSES OF ACTION

14. The Website is a popular and lucrative enterprise that holds itself out as featuring the “best of the web.”

15. The Website purposefully displays celebrity content, including news and/or photographs, including Plaintiffs' copyrighted photographs.

16. Upon information and belief, some content on the Website is uploaded or otherwise stored by the founders of the Website.

17. Upon information and belief, some content on the Website is uploaded or otherwise stored by the employees, moderators and/or administrators of the Website.

18. Upon information and belief, some content on the Website is uploaded or otherwise stored by “whales,” as that term is defined by the

1 Website.

2 19. The Website is monetized in that it contains paid advertisements
3 and/or sells merchandise to the public and, on information and belief, Defendant
4 profits from these activities.

5 20. The Website is monetized in that it charges fees for some of the
6 services it provides.

7 21. Without permission or authorization from Plaintiffs, Defendant
8 volitionally selected, copied, modified, stored, moved and/or displayed
9 Plaintiffs' copyright protected photographs as set forth in Exhibit "1" which is
10 annexed hereto (hereinafter collectively referred to as the "Photographs"), and
11 incorporated the Photographs in their entirety on the Website.

12 22. The Photographs were copied, modified, stored, moved and/or
13 displayed without license or permission, thereby infringing on their copyrights
14 (hereinafter collectively referred to as the "Infringements").

15 23. As is set forth more fully in Exhibit "1", each listed Infringement
16 contains the URL ("Uniform Resource Locator") for a fixed tangible medium of
17 expression that was sufficiently permanent or stable to permit it to be
18 communicated for a period of more than transitory duration and therefore
19 constitutes a specific item of infringement. *17 U.S.C. §106(5); Perfect 10, Inc.*
20 *v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007).

21 24. Each listed Infringement in "Exhibit 1" is an exact copy of
22 Plaintiffs' original image(s) that was directly copied and stored by Defendant on
23 the Website.

24 25. Each Infringement listed in "Exhibit 1" constitutes a separate and
25 distinct act of infringement by Defendant.

26 26. Upon information and belief, Defendant takes an active and
27 pervasive role in the content posted on its Website, including, but not limited to
28 copying, posting, selecting, commenting on and displaying Plaintiffs'

1 Photographs.

2 27. Upon information and belief, Defendant directly contributes to the
3 content posted on the Websites by, *inter alia*, directly employing moderators,
4 administrators and “whales” as Defendant's agents (hereinafter collectively
5 referred to as “Employees”), who are responsible for operating and controlling
6 the activities on the Website.

7 28. Defendant's act of designating Employees as moderators,
8 administrators, and/or “whales”, regardless of their actual position or their
9 nature of relationship with Defendant, and providing them with specific forum-
10 related powers beyond that of a typical user leads a “third party reasonably to
11 believe the actor has authority to act on behalf of the Defendant.” Restatement
12 (Third) of Agency, § 2.03 (2006); *Columbia Pictures Industries, Inc. v. Fung*,
13 No. CV 06–5578(SVW), 2009 WL6355911 (C.D.Cal. Dec.21, 2009) *aff'd in*
14 *part and modified*, 710 F.3d 1020 (9th Cir. 2013).

15 29. Defendant distinguishes “whales” as being producers or creators of
16 content, whereas “pandas” are viewers or consumers of content.

17 30. At all material times hereto the Employees were acting within the
18 course and scope of their employment.

19 31. At all material times hereto the Employees were acting within the
20 course and scope of their agency.

21 32. 17 U.S.C. §512, also known as the Digital Millennium Copyright
22 Act (“DMCA”) provides a defense against an infringement that is “by reason of
23 the storage at the direction of a user.” The applicable legislative history
24 provides that “[i]nformation that resides on the system or network operated by
25 or for the service provider through its own acts or decisions and not at the
26 direction of a user does not fall within the liability limitation of subsection (c).”
27 *See* S.Rep. No. 105–190, at 43 (1998).

1 33. Upon information and belief, none of the Infringements were
2 posted at the direction of a “user” as that term is defined in 17 U.S.C. §512(c).
3 Instead, all of the Infringements were posted by Defendant’s founder(s),
4 employees, moderators, administrators and/or “whales.”

5 34. Upon information and belief, Defendant was aware of facts or
6 circumstances from which the determination regarding the Infringements was
7 apparent.

8 35. Many of the Infringements were posted by Adam Rifkin, a co-
9 founder of Defendant.

10 36. Other Infringements were reviewed, moved, or otherwise “stashed”
11 by Adam Rifkin.

12 37. Defendant cannot claim that it was unaware of the infringing
13 activities, including the specific Infringements which form the basis of this
14 complaint, since such a claim would amount only to willful blindness of the
15 Infringements on the part of Defendant.

16 38. Upon information and belief, Defendant engaged in the
17 Infringements knowingly and in violation of applicable United States Copyright
18 Laws.

19 39. Additionally, upon information and belief, Defendant, with “red
20 flag” knowledge of the infringements, failed to promptly remove same (*see 17*
21 *U.S.C. §512(c)(1)(A)(i)*) as evidenced by the following:

22 (a) Defendant's Employees and/or co-founder, created, participated in
23 and commented on “threads” or postings that encouraged members
24 to post copyrighted photographs, including Plaintiffs' Photographs;
25 and

26 (b) Defendant's Employees and/or co-founder actively reviewed,
27 monitored, commented on, deleted and/or “cleaned” postings and
28 threads containing Plaintiffs' Photographs.

1 54. For example, on information and belief, Defendant had the practical
2 ability to police the images on the Website when its Employees edited,
3 modified, moved, “stashed” or otherwise interacted with the Photographs and,
4 therefore, had the right and ability to supervise and control the Infringements.

5 55. As a direct and proximate result of such refusal to exercise its right
6 to stop or limit the infringing conduct, on information and belief, Defendant's
7 employees, moderators, administrators, co-founders, users and “whales” have
8 continued to infringe upon Plaintiffs' Photographs, which in turn generates
9 profits for Defendant directly from the use of the Infringements.

10 56. Upon information and belief, Defendant enjoyed a direct financial
11 benefit from the infringing activity of its members, Employees, Agents, co-
12 founders, members and “whales” from, *inter alia*, advertising revenue from the
13 increased traffic to its Website, increased fees paid by sponsors, and increased
14 fees charged for services.

15 57. Upon information and belief, Defendant further enjoyed a direct
16 financial benefit from using the “draw” of Plaintiffs' Photographs to increase
17 user traffic, thereby increasing revenue.

18 58. Defendant is liable as a vicarious infringer since it profited from
19 direct infringement while declining to exercise a right to stop or limit it. *See*
20 *e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d. 1146, 1171 (9th Cir. 2007);
21 *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929-30
22 (2005).

23 59. As a direct and proximate result of Defendant's misconduct,
24 Plaintiffs have been substantially harmed and should be awarded statutory
25 damages against Defendant pursuant to 17 U.S.C. §504(c) of up to \$30,000.00
26 per infringement, or up to \$150,000.00 for any Infringement found to be willful,
27 in an amount to be proven at trial.
28

THIRD COUNT

(Inducement of Copyright Infringement)

60. Plaintiff repeats and incorporates, as though fully set forth herein, each and every allegation contained in the preceding paragraphs, as though set forth in full herein.

61. Defendant takes affirmative steps to encourage and/or foster infringement.

62. Defendant states that the founders of PandaWhale realized that the internet had become “a series of firehoses,” where “stuff goes by so quickly that within a short period it becomes impossible to find again.”

63. Defendant created PandaWhale to “save the gold nuggets from the rushing stream of content.”

64. Defendant describes PandaWhale as “software for saving and organizing great stuff” as well as a community of people who gather to share and view that stuff.

65. Defendant provides its employees, moderators, administrators, co-founders, and “whales” with a browser extension specifically designed to clip text, images and videos from other websites and store them on PandaWhale.

66. Defendant actively encourages its employees, moderators, administrators, co-founders, and “whales” to find the “gold nuggets” on the internet, including celebrity content, and to “stash the best stuff on the web” on PandaWhale.

67. Defendant instructs its employees, moderators, administrators, co-founders, and “whales” on how to use the browser extension for this purpose.

68. Defendant’s actions show an affirmative intent that the product be used to infringe. . . .” *Grokster*, 545 U.S. at 936.

69. Individuals using the Website have been provided with the means and mechanisms to directly infringe and are directly infringing Plaintiffs’ copyrights, by, for example, creating unauthorized reproductions of Plaintiffs’

1 copyrighted works and distributing copies of such works in violation of
2 Plaintiffs' exclusive rights under 17 U.S.C. §§ 106 and 501.

3 70. Defendant has induced and continues to induce infringement by, for
4 example, providing technology on the Website to download and/or forward an
5 image to such social media providers such as Facebook, Instagram, and Twitter
6 and/or failing to block or diminish access to infringing material even though
7 there are technological means to do so that are known to Defendant.

8 71. Defendant's infringement is and has been willful, intentional,
9 purposeful and in disregard of the rights of Plaintiffs, and has caused substantial
10 damage to Plaintiffs.

11 72. As a direct and proximate result of Defendant's misconduct,
12 Plaintiffs have been substantially harmed and should be awarded statutory
13 damages against Defendant pursuant to 17 U.S.C. §504(c) of up to \$30,000.00
14 per infringement, or up to \$150,000.00 for any Infringement found to be willful,
15 in an amount to be proven at trial.

16 **FOURTH COUNT**

17 ***(Injunction Pursuant to 17 U.S.C. §502)***

18 73. Plaintiff repeats and incorporates, as though fully set forth herein,
19 each and every allegation contained in the preceding paragraphs, as though set
20 forth in full herein.

21 74. Plaintiffs request a permanent injunction pursuant to 17 U.S.C.
22 §502(a) prohibiting Defendant from displaying the Infringements.

23 **FIFTH COUNT**

24 ***(Attorney Fees and Costs Pursuant to 17 U.S.C. §505)***

25 75. Plaintiff repeats and incorporates, as though fully set forth herein,
26 each and every allegation contained in the preceding paragraphs, as though set
27 forth in full herein.

28 76. Plaintiffs request, pursuant to 17 U.S.C. §505, their attorney fees
and costs for the prosecution of this action.

JURY DEMAND

77. Plaintiff hereby demands a trial of this action by jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests judgment as follows:

That the Court enters a judgment finding that Defendant has infringed on Plaintiffs' rights to the Photographs in violation of 17 U.S.C. §501 *et seq.* and award damages and monetary relief as follows:

- a. Statutory damages against Defendant pursuant to 17 U.S.C. §504(c) of up to \$30,000.00 per infringement, or up to \$150,000.00 for any Infringement found to be willful, in an amount to be proven at trial or, in the alternative, Plaintiffs' actual damages and the disgorgement of Defendant's wrongful profits in an amount to be proven at trial; and
- b. A permanent injunction against Defendant pursuant to 17 U.S.C. §502; and
- c. Plaintiffs' attorneys' fees pursuant to 17 U.S.C. §505; and
- d. Plaintiffs' costs; together with
- e. Such other relief that the Court determines is just and proper.

1
2 DATED: October 8, 2015
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